U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 19 March 2007

Case No: 2006-LHC-01278
OWCP No.: 6-196862

In the Matter of:

J.C.,
Claimant,

v.

**ATLANTIC TECHNICAL SERVICES/
NATIONAL CONTAINER OF SAVANNAH/
ACE AMERICAN INSURANCE c/o
RISK ENTERPRISE MANAGEMENT,**
Employer/Carrier,

and

PALMETTO SHIP AGENCY,
Employer,

and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,**
Party-In-Interest

Appearances: Gregory E. Camden, Esq.
For the Claimant

Dana Adler Rosen, Esq.
For the Employer/Carrier

John Barrett, Esq.
For the Employer

Before: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act ("Act"), as amended, 33 U.S.C. § 901 et seq. (2000). A formal hearing was held on October 25, 2006, in Savannah, Georgia, at which time, the parties were afforded a full opportunity to present evidence and argument as provided in the Act and applicable regulations. At the hearing, Administrative Law Judge Exhibits 1 through 8, Claimant Exhibits 1 through 10, and Palmetto Exhibits 1 through 3[1] were admitted, as were Atlantic Technical Services Exhibits 1, 2, 5, and 6, pages 46 and 55-64 of Exhibit 3, and pages 8 and 14-17 of Exhibit 4. (TR at 6-14, 54-55.)[2] The post-hearing written briefs filed by the respective counsel for the Claimant[3] and the Employers, Atlantic Technical Services and Palmetto Ship Agency, were also considered.[4]

The findings of fact and conclusions which follow are based upon a complete review of the entire record in light of argument of the parties, as well as applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties have stipulated to, and this Administrative Law Judge finds, the following as fact:

1. The audiogram of June 30, 2005, established a 26.6 percent binaural hearing loss per American Medical Association guidelines.

2. The audiogram of July 18, 2006, established a 19.1 percent binaural hearing loss per American Medical Association guidelines.

3. The audiogram of December 9, 2005, is insufficient to establish a calculated percentage of hearing loss under the American Medical Association guidelines.

4. The Claimant filed a timely claim against both Employers.

5. The Claimant's average weekly wage is $934.15 per week, with a compensation rate of $622.76 per week.

---

[1] Palmetto's Exhibit 1 was admitted into evidence at the hearing with the caveat that it was only to be used for evaluation of the *Ruiz* factors. (TR at 14.)

[2] The following abbreviations will be used throughout this Decision as citations to the record: JX – Joint Exhibit; ALJX – Administrative Law Judge Exhibit; CX – Claimant Exhibits; AX – Atlantic Technical Services Exhibits; PX – Palmetto Exhibits; and TR – Transcript of Hearing.

[3] After August 1, 2006, the Department of Labor policy requires the use of initials for claimants' name in headings and use of a descriptive title in the decision. Accordingly, "Claimant" is used in this decision instead of the proper name of the individual who is the subject of this decision.

[4] On December 28, 2006, counsel for ATS filed an objection to the Claimant's brief, wherein portions of the Claimant's deposition testimony were used to support the Claimant's case. In particular, ATS objected to the Claimant's citations to pages 11, 17, 21, 41, and 42 of AX 3, which is the transcript of the Claimant's deposition, on pages 7 and 10 of his brief. Since only pages 46 and 55-64 of AX 3 were admitted into evidence at the hearing, ATS's objection is sustained and those portions of the Claimant's brief that reference portions of AX 3 that were not admitted into the record will not be considered.

6. Jurisdiction under the Longshore Act existed at all times relevant to this case between the Claimant and the Employers.

(TR at 5.)

ISSUES

1. Whether the Claimant's hearing loss was caused by his maritime employment.

2. Whether the Claimant is entitled to permanent partial disability benefits for hearing loss.

3. Whether the Claimant is entitled to medical treatment for his hearing loss pursuant to 33 U.S.C. § 907.

4. Whether 33 U.S.C. § 914(e) penalties are appropriate for failure to timely file a Notice of Controversion.

5. Whether Atlantic Technical Services ("ATS") or Palmetto Ship Agency (Palmetto) is the responsible employer.

6. Whether ATS, or Palmetto, or both companies are liable for benefits payable under the Act.

PARTY CONTENTIONS

Claimant's Contentions:

The Claimant, through counsel, contends that his testimony invoked the 33 U.S.C. § 920(a) presumption that his hearing loss is noise-induced and work-related. He also contends that the Employer has failed to rebut that presumption with substantial evidence that his hearing loss is not related to his employment. However, even if the presumption has been rebutted, he asserts that he has established by the evidence as a whole, and within a reasonable degree of probability, that his hearing loss is related to his employment. He also asserts that, even if his history of hunting and gun use contributed to his hearing loss, the entire amount of the loss is compensable because his employment caused or aggravated it.

The Claimant claims entitlement to permanent partial disability benefits for a 26.6% binaural hearing loss, which equates to 53.2 weeks of benefits. He also claims entitlement to medical treatment, including hearing aids, pursuant to 33 U.S.C. § 907 for his noise-induced work-related hearing loss. Further, he contends that the Employer failed to file a timely Notice of Controversion, which entitles him to a 10% penalty.

Employer ATS's Contentions:

ATS, through counsel, contends that it has rebutted the 33 U.S.C. § 920(a) presumption that the Claimant's hearing loss is due to his employment. It argues that the Claimant's hearing loss was not due to noise exposure during his employment, but was instead due to hunting without ear protection since the age of fourteen. It also argues that if it is found that the Claimant's hearing loss is due to his employment, the extent of the hearing loss should be determined by the most recent audiogram or, in the alternative, by averaging the results of the Claimant's audiograms.

ATS further contends that the Claimant was not a borrowed employee and Palmetto Shipping Agency, not ATS, was the Claimant's employer. However, ATS claims that, even if the Claimant was ATS's borrowed employee, it had an indemnity contract with Palmetto whereby Palmetto agreed to indemnify all ATS workers for workers' compensation claims, including those under the Longshore Act. ATS's position is that the indemnity contract was a condition precedent to its doing business with Palmetto, which gives the Administrative Law Judge jurisdiction to determine whether there was a valid indemnity contract.

ATS also alleges it timely filed its Notice of Controversion and is not responsible to pay penalties pursuant to 33 U.S.C. § 914(e).

Employer Palmetto's Contentions:

Palmetto, through counsel, contends that it is not the employer responsible for compensating the Claimant for any hearing loss he sustained during his employment. It alleges that ATS is the borrowing employer and is therefore responsible for compensating the Claimant. However, if Palmetto is determined to be the responsible employer, it argues that the Claimant's compensable hearing loss should be determined on the basis of the July 18, 2006, audiogram.

Palmetto also contends that the issue of whether there was an indemnification contract between ATS and Palmetto is outside the Administrative Law Judge's jurisdiction because it was a condition subsequent. Alternatively, Palmetto argues that if that issue is properly before this Court, ATS has failed to present sufficient evidence to prove the existence of a valid indemnification contract and the terms of the contract.

Finally, Palmetto argues that it should not be penalized pursuant to 33 U.S.C. § 914(e) for failing to file a timely Notice of Controversion because imposing a penalty would not further the purpose of the penalty provision and would be a violation of public policy.

SUMMARY OF RELEVANT EVIDENCE

Testimony of Claimant (TR 22-53):

The Claimant testified that he is sixty-five years old and he was a member of the International Longshoreman's Association Local 2046 when he last worked on the waterfront. He stated that his last work was as a mechanic, performing chassis and container repair. He explained that a

chassis is a trailer with wheels that goes under the container and is used to pull containers when they are loaded and unloaded from ships. The Claimant stated that he repaired twist locks, side pins, and lights, and did frame work on the chassis.

The Claimant stated that when he did tire repair, he used a one-inch impact wrench powered by an air compressor, tire bars, and tire hammers. He reported that the air compressor made an exhaust noise and the impact wrench made an air discharge noise and a knocking noise. The tire hammer, which weighed about six or eight pounds, was used to break down the tire, which consisted of knocking the tire and rim loose. He stated that he would hit right between the rim and the tire and it was a "silent hit." If he hit the tire, he heard no noise at all, but if he hit the rim, there were sparks and a noise that was not too loud. He reported that the tires were ten hundred twenties and the rims probably weighed seventy-five to eighty pounds. He did not know what the tires themselves weighed.

The Claimant testified that when he did frame repair, he used impact wrenches and rivet guns. He stated that the rivet guns were powered by an air compressor as well. He reported that the air compressors can run as much as six hours during an eight hour day. The Claimant described the noise a rivet gun makes as being "like a loud hammering noise against the sides of the boxes. It echoes through the box." He reported that when they drove in rivets, there was a man inside the container and one outside the container, and the noise is louder when one is inside the container. He stated that the difference in noise between being inside a steel container and an aluminum container is due to the use of a welding machine in the steel container. The Claimant stated he also used bucking bars, which are flat bars that are put against a rivet on the inside to make it seal, for frame repair. He stated there is a loud noise when the air-driven gun hammer, which has a head to fit the rivet, hits against the bucking bar.

The Claimant stated that he last worked in June of 1989, when he suffered a work injury to his lower back. He reported that as far has he knew, he was working for ATS at that time. He stated that he thought he was working for ATS because the sign on the work truck displayed "ATS," as did his paperwork. He also wore an ATS uniform for a year-and-a-half to two years before he retired. He was not sure of the name on his paychecks. The Claimant testified that he did know of the company Palmetto when he last worked at the waterfront, but he thought it had left the area. He did not at any time think he was working for Palmetto.

The last year he worked on the waterfront, the Claimant was a working foreman. He stated that he got the foreman job through his union because he had the second highest seniority. He reported that his duties were the same as the other mechanics, but that he also had to make sure the job was done right and act as a liaison between the manager and mechanics. He used all the same tools described above and he worked both out of a shop and in mobile vans. When he worked out of a mobile van, he stated that he had scrap metal, tires, nuts, bolts, and screws with him and would go to the container, repair it, and return to the shop. He stated that sometimes there would be other service trucks at the same site performing work, but that there were no ships being loaded because they would not be performing repairs at the riverfront.

The Claimant testified that he first noticed hearing problems around 1988 or 1989, when other mechanics started complaining about him not being able to hear things they said. He stated that

his wife also complained about him not being able to hear what she said. He testified that he did not see a doctor for hearing problems until June 30, 2005, about sixteen years after he retired, because he did not really pay any attention to his hearing problems until after he retired. He reported that that was the first time he had an audiogram, but he could not remember the name of the doctor he saw. He went to that doctor because the union hall told him to hire a hearing doctor and his personal insurance told him who to see.

On June 30, 2005, the Claimant went to the doctor's office with his wife. He testified that his wife filled out his paperwork for him because she wrote better. He stated she would ask him questions and he would tell her what to write. He testified that he was sitting with his wife when she filled out the paperwork in the doctor's office that day.

The Claimant testified that he saw Dr. Fred Daniel in Savannah at the request of ATS. He stated that he had a hearing test and it was not any different than his prior test. He reported that Palmetto sent him to Charleston for another hearing test, which was the same as the previous two tests.

The Claimant further testified that he is a hunter and has been since age 14. He hunts deer and used to hunt doves a long time ago. He stated that he has gone hunting two or three times per year since 1989. He estimated he probably fired one round each time he went hunting. He reported that he does not wear ear protection when he hunts and he did not wear hearing protection when he worked on the waterfront.

On cross-examination by counsel for ATS, the Claimant testified that he retired in 1989. When asked about a workers' compensation claim against Palmetto from 1991, he testified that he did not remember filing a claim against Palmetto that year. He did remember receiving a settlement and $600 per month from Palmetto in 1990 or 1991. He also stated he did not remember having his deposition taken in 1991 as part of that claim, but he remembered being at a meeting with his attorney.

The Claimant testified that he worked for Palmetto from the time it started working at the port in Savannah, up until it left the port. He stated that he did not remember when Palmetto started working at the port. He testified that he knew Palmetto and ATS had a business relationship and he believed ATS was the contractor for Palmetto when he first started. He also testified that he was a general mechanic when he worked for ATS and that his duties were the same as other general mechanics. He stated he got his work out of the union hall.

The Claimant stated that he began hunting when he was 14, but he did not deer hunt then because he was too small. He stated that he and his brother started off squirrel hunting, but they did go on deer hunts and if they came across a deer, they would try to kill it. The Claimant reported that deer season is from October 13 – January 31 each year and that he goes deer hunting as often as he can. He agreed that he generally goes deer hunting more than twelve times per year, but he does not shoot his gun twelve times per year. He stated he has not been deer hunting in the previous two or three years, but he did continue to hunt after he stopped working in 1989. The Claimant stated he had also been dove hunting since he was 14 and went about twice per year.

The Claimant testified that he uses a .44 caliber gun for deer hunting and a 12 gauge shotgun for dove hunting. He also testified that he has never worn hearing protection when hunting. He stated that, after going dove hunting and deer hunting, he has a little ringing in his ears.

The Claimant testified that he saw Dr. Poole for a hearing test in 2005, sixteen years after retiring. He reported that he did not talk to Dr. Poole or his office staff about his prior job or any specific noise exposure at work. He stated that Dr. Poole did not tell him the cause of his hearing loss.

On cross-examination by counsel for Palmetto, the Claimant reported that Kerry Scott is the president of the Local 2046 union. The Claimant stated that he had the opportunity to go to any job, since he was the second senior man in the union. He further stated that he reported to the ATS shop on a Monday morning and he never worked for any other longshore or ILA company after that day.

The Claimant testified that the tools and mobile vans he used were provided by ATS. He never drove the pickup truck as part of his job. He reported that the mobile vans displayed "ATS" on it, as did the shop where he worked. He testified that he interacted with other maintenance mechanics and the ""M & R" manager. The Claimant believed the manager, Harry Nacy, was an employee of ATS. He testified that no one from Palmetto told him what to do on a daily basis.

The Claimant stated that there were other container maintenance companies in the port in 1988 and 1989, but he liked working for ATS because it was a better job. He went to ATS every Monday without specifically being ordered to go there and worked the whole week. He stated that he did not change jobs from day to day or work for different companies. He also stated that the containers he worked on were containers that came on and off ships, but he did not know who the containers belonged to.

On redirect examination, the Claimant testified that the ATS shop he worked in was located inside Gate 3 on the left side at the Georgia Port Authority. He testified again that he began dove hunting at age 14 and that he went deer hunting, but he was too small to handle a gun then. He also stated that he was dove hunting at age 15.

On recross examination by counsel for ATS, the Claimant testified that when he went dove hunting, he would be out in the field for about four hours in the morning and would go back later in the afternoon for three to four hours. He stated that he grew up hunting and he and his brother would hunt anything that moved. He agreed that at his November 2005 deposition, he testified that he began hunting when he was younger than 14, and that was an approximate age.

On examination by this Administrative Law Judge, the Claimant testified that he was with the ILA for fifteen years before he retired. He stated that he worked for National Container Southeast before working for ATS. He also stated that ""M & R"" stood for maintenance and repair for ATS.

The Claimant was unfamiliar with the names John Perrotti, Tina Will, and Gaye Mayfield. He reported that when he was working for ATS, he did not get repair slips, but learned of repairs that were needed by word of mouth. He stated that many times, the directions would come over the radio and from the ILA office. An "M & R" manager would come downstairs and tell him where to go and give him a box number or chassis number and the location to go find it. He could only remember that one of the managers was named Harry, but he could not remember his last name.

The Claimant testified that he worked in the shop while it was occupied by both ATS and Palmetto. He reported that ATS and Palmetto were in the same building until Palmetto left. He worked out of that particular shop for a total of two years. He testified that ATS and Palmetto were not together anymore when he left the shop and that Palmetto left about a year before he retired. When Palmetto left, the "M & R" manager stayed with ATS. He stated that the only name he remembers being on the shop was ATS and it was on the shop from the beginning, even when Palmetto was there.

On recross examination by counsel for Palmetto, the Claimant clarified that the ATS "M & R" manager or the secretary would bring job assignments down to the shop from the ATS office upstairs.

Medical Report of Dr. T. Meyer, M.D. – July 20, 2006 (CX 1; AX 1; PX 2)

CX 1, AX 1, and PX 2 contain copies of the medical report of Dr. T. Meyer, M.D., dated July 20, 2006. Dr. Meyer evaluated the Claimant for hearing loss on July 18, 2006, at the East Cooper Clinic of the Department of Otolaryngology at the Medical University of South Carolina ("MUSC"). At the time of the evaluation, the Claimant was 64 years old, married, and smoked a pack of cigarettes daily for approximately fifty years, even though he had been told to quit. Dr. Meyer noted he had worked as a longshoreman for many years and retired in 1990 due to back problems. The Claimant complained of hearing loss for at least the past ten years, dizziness, and steady bilateral tinnitus, and denied having drainage or a family history of hearing loss. Dr. Meyer noted that the Claimant has no noise exposure now, but had noise exposure while working at the docks and while working in a canister with a rivet gun, which was loud. The Claimant denied wearing hearing protection when working and reported that it was not required. Dr. Meyer also noted that the Claimant was recently diagnosed with diabetes, has been on a diet to lose weight, had nasal cancer resected approximately eight years prior, and had surgery on his neck. The Claimant was on seven medications at the time of the evaluation, including blood pressure medication and blood thinners.

Upon examination, Dr. Meyer noted that both of the Claimant ear canals were narrow, but the tympanic membranes were clear and mobile. The Claimant appeared well, but had a mild communication impairment. He had no cutaneous lesions in the face or neck and he had no tenderness on palpation of the sinuses. His extraocular movements were intact and he had no spontaneous or gaze-induced nystagmus. He had no mucosal lesions or polyps and the septum and turbinates were normal. The teeth and inside of his mouth appeared normal. He had no masses or tenderness of his neck, his thyroid was non-palpable and Dr. Meyer felt no lymphadenopathy in the Claimant's neck. The Claimant's salivary glands were normal and his

facial movement and sensation was also normal. The remainder of his cranial nerves were grossly intact and cerebellar testing was normal. The Weber lateralized slightly to the right, the Rinne was positive in both ears, and the Romberg and Fukuda were normal.

Dr. Meyer obtained an audiogram to assess the Claimant's hearing. The Claimant had a "symmetric high-frequency sensorineural hearing loss. He has an SRT of 20 dB on the right and 15 dB on the left with 92% word recognition bilaterally." Dr. Meyer opined that the Claimant's hearing loss was likely due in part to his history of noise exposure. He recommended that the Claimant wear hearing protection if he was going to be exposed to loud noises in the future. He also recommended that the Claimant quit smoking. He stated that the Claimant should be an excellent candidate for hearing aids, but he could be difficult to fit because of the configuration of his ear canals. He recommended that the Claimant see an audiologist with experience in fitting patients with strangely-shaped ear canals. Dr. Meyer stated that the Claimant should continue to have his hearing tested and should follow-up on an as-needed basis.

Audiogram from July 18, 2006 (CX 2; AX 1; PX 2)

CX 2, AX 1, and PX 2 contain copies of the Claimant's audiogram performed on July 18, 2006, at MUSC, which was discussed in Dr. Meyer's medical report. The audiogram was performed by Dr. Klein and the test reliability was rated as good.

Letter from Dr. F. Daniel, M.D. – Addendum to Medical Record (CX 3; AX 2)

CX 3 and AX 2 contain an addendum to the January 12, 2006, medical report of Dr. F. Daniel, M.D. The addendum is dated January 16, 2006. Dr. Daniel initially diagnosed a noise-induced hearing loss, the majority of which "is likely due to noise exposure while working in the container repair business from the 1970s to 1989." After considering the Claimant's frequent deer and dove hunting, which he did without ear protection and which continued after the Claimant's retirement from ATS in 1989, Dr. Daniel opined that "it is highly likely that he has had at least some additional noise induced hearing loss from this hobby since 1989." He further opined that "his additional hearing loss would probably constitute about 15% or so of his total hearing loss, with 85% of it being due to his occupational noise exposure from the 1970's to 1989."

Medical Report of Dr. Daniel (CX 4; AX 2)

CX 4 and AX 2 contain the medical report of Dr. Daniel. On December 9, 2005, the Claimant saw Dr. Daniel, complaining of hearing problems. The Claimant reported that he worked for ATS as a container repairman for one to two years and quit in 1989. He reported that he worked in a similar capacity with containers after 1989 and retired in 1990. He stated he has had hearing loss since before he retired, but he did not have an audiogram until June of 2005. Dr. Daniel noted that the Claimant presently works driving and unloading containers. The Claimant stated the only noise he has been exposed to since retiring is driving a truck, but he reported that his truck is not noisy. Dr. Daniel noted that the Claimant has never used ear protection. He also noted the Claimant's history of dove and deer hunting and that he did not wear ear protection while hunting. The Claimant denied skeet shooting. Dr. Daniel further noted the Claimant's

history of year-round sinus problems with nasal obstruction and clear mucous, obstructive sleep apnea, hypertension, heart disease, lung disease, cancer of the nose, tonsillectomy, appendectomy, umbilical hernia repair, and nasal surgery. The Claimant reported that he smokes one pack of cigarettes per day and has for fifty years.

On examination, Dr. Daniel observed that the Claimant was well-developed, well-nourished, and had appropriate grooming. He spoke in a hyponasal voice. With respect to his ears, he had partial cerumen impaction on the left side removed, his tympanic membranes were clear, and his auricles were in normal position and without lesions. Dr. Daniel reviewed the Claimant's audiogram, which showed bilateral sloping mild to severe sensorineural hearing loss. He diagnosed "noise induced hearing loss – majority of the hearing loss likely due to noise exposure working in container repair from the 1970's to 1989. Could have smaller component from hunting noise." He noted that the Claimant may need nasal surgery. He prescribed Decadron, Nasonex, and Allegra, and instructed the Claimant to follow up in one month.

Medical Report of Dr. M. Poole, M.D. (CX 5)

CX 5 is a copy of the medical report of Dr. M. Poole, M.D., dated December 21, 2005. Dr. Poole stated that he is a board certified otolarygologist and is currently in a multi-specialty private practice group at Memorial Health University Medical Center in Savannah, Georgia. Dr. Poole examined the Claimant on June 30, 2005, prior to the Claimant's audiogram. The Claimant had cerumen impactions in each ear, which Dr. Poole removed. The Claimant went for an audiogram and Dr. Poole did not have any further direct contact with the Claimant after his audiogram. Dr. Poole reviewed the Claimant's audiogram, which showed "bilateral, relatively symmetric, sensorineural hearing loss, dropping from 25 dB at 1000 Hz down to approximately 90-100 dB at 4000 Hz." He noted the Claimant's occupational history of noise exposure.

Dr. Poole stated that the Claimant's hearing loss was more than he expected to see based on the Claimant's age alone. He also stated that the most common cause of the Claimant's type of hearing loss is noise. Further, the "relatively symmetric appearance of this is more consistent with a diffuse environmental exposure as opposed [sic] to a more episodic exposure, such as gunfire, which would typically affect one ear more than the other." Dr. Poole opined that most people in the Claimant's position would benefit from a hearing aid in one or both ears and that the Claimant would be a good candidate for hearing aids because he still has relatively good speech discrimination scores

Audiogram from December 9, 2005 (CX 6)

CX 6 contains a copy of the Claimant's audiogram performed on December 9, 2005. The Claimant complained of tinnitus and reported a history of noise exposure. The Claimant's speech reception threshold ("SRT") was 40 dB on the right side and 30 dB on the left. His speech discrimination was 92% on the right and 76% on the left using a monitored live voice ("MLV"). The recommendations were a hearing aid evaluation and medical referral. The tester, Kneufeld, estimated the test accuracy as good.

Audiogram from June 30, 2005 (CX 7)

CX 7 contains a copy of the Claimant's audiogram performed on June 30, 2005, which was discussed in Dr. Poole's medical report. The tester noted a significant history of noise exposure. His SRT was 30 dB on the right and 25 dB on the left. His speech discrimination was 95% on the right and 84% on the left, both at 80 dB, using an MLV. The Claimant's assessment was "mild sloping to profound sensorineural loss bilat." The tester, C. Burns, rated the test reliability as good.

Medical Records from Memorial Georgia Ear Institute – June 30, 2005 (CX 8)

CX 8 contains the Claimant's medical records from Memorial Georgia Ear Institute dated June 30, 2005. The Claimant complained that he could not hear and indicated his symptoms began about 15 years prior. He reported that he had not seen any physicians for his hearing loss and had taken no medication. He indicated that he suffered from asthma and was allergic to aspirin. He also indicated that he took medication on a routine basis, but did not list what medications, and that he used tobacco and alcohol, but did not indicate how much. His family history was positive for diabetes and heart disease.

Regarding his hearing problems, the Claimant noted that he first noticed hearing loss 20 years ago. He had no family history of hearing loss. He reported that sometimes he can hear a conversation but is unable to understand the words, and he often asks people to repeat what they have said. He does not have trouble hearing over the telephone if the other party talks loud enough. He indicated that no one has told him he plays the television or radio too loud. He also indicated that others tell him he speaks loudly at times. He reported ringing in his ears and a history of noise exposure as a mechanic. He has never had ear surgery.

On June 30, 2005, the Claimant saw Dr. Poole, complaining of bilateral cerumen impactions. Dr. Poole softened and removed the cerumen. He noted that the Claimant's tympanic membranes were normal.

Form LS-207 Notice of Controversion of the Claimant's Right to Compensation (CX 9)

CX 9 contains a copy of the Employer/Carrier's Notice of Controversion of the Claimant's Right to Compensation under the Act. The Notice lists the injury as hearing loss and the date of such injury as June 30, 2005. The Employer/Carrier alleged that its first knowledge of the Claimant's injury was August 23, 2005. The Notice is dated August 26, 2005, and was filed with OWCP on September 12, 2005. A copy of the Notice was sent to the Claimant and his counsel on September 15, 2005.

Letter from OWCP – August 17, 2005 (CX 10)

CX 10 contains a letter to the Employer/Carrier, dated August 17, 2005, regarding the Claimant's filing of a claim for compensation under the Act.

Transcript of the Claimant's Deposition – November 16, 2005 (AX 3)

The Claimant was deposed on November 16, 2005. At the hearing, pages 46 and 55-64 of the deposition transcript were admitted into evidence. On page 46, the Claimant testified that Dr. Poole examined his ears, but did not tell him what was wrong. He also testified that he did not discuss his work history with Dr. Poole or with anyone else in Dr. Poole's office. He stated that as far as he knew, they did not know what he did for a living.

On pages 55-64, the Claimant testified regarding his history of hunting. He testified that he is a hunter, mostly for deer, but he also used to go dove hunting. He stated that he grew up hunting and started when he was approximately 14 and still goes when he can get out. He also testified that he has never been duck or goose hunting and has never been to a range.

The Claimant stated that he only hunts deer now and deer season is from October 15 to January 1. He had not been yet, but he planned to go "[o]ne of these days." He reported that he had gone deer hunting about a dozen times the previous year, but did not get any. He testified that twelve times a year is not typical and he normally goes "[e]very chance I get," which is usually more than twelve times. He stated that in the last couple of years he has not gone as much because he has not had time. He does not wear hearing protection when he goes deer hunting.

The Claimant started dove hunting at 14, when he "was big enough to pick up a gun." He stated that he used to belong to a dove club and would sometimes go hunting three times per week, from sun up to sun down. He stated that he was able to do this for most of his life from the time he was 14 because he and his brother hunted together when they were growing up. He was unable to estimate the number of times he had gone. The Claimant used a 12-gauge shotgun for dove hunting, which he still owns. He reported going through about a box of shells each time he went and that his brother would go through one to four boxes. The last time he went was about ten years prior, maybe longer. He stopped dove hunting at that time because there was not as much game as there used to be and he did not have anywhere to hunt. He never used hearing protection when dove hunting.

The Claimant stated that he only hunts with a .44 caliber automatic gun now and does not use a muzzle break. He reported that he collects guns and owned fourteen at the time. He stated that all of the guns are antiques for collection, but they are useable and he has used all of them at some point. The only one he uses regularly is the .44 caliber.

The Claimant reported that his ears would ring after going dove hunting, even when he was young, but he could not remember if he had ringing when he last went dove hunting ten years ago. He remembered the ringing only lasting a few minutes. He stated that, when deer hunting, he only fires one shot and his ear probably rings for a few minutes afterward.

Transcript of the Claimant's Deposition– January 23, 1991 (AX 4)

The Claimant was deposed on January 23, 1991. At the hearing, pages 8 and 14-17 of the deposition transcript were admitted into evidence. On page 8, the Claimant testified that there were about 115 union employees in Local 2046 when he left. He ranked at the top of the list.

He reported that his duties were no different than the other employees and that everyone did the same work. He stated that he performed general mechanic work on trailers and refrigeration work.

On pages 14-17, the Claimant testified regarding his job. He testified that he worked 8:00 to 5:00, plus overtime if there was any. He stated he had worked with Palmetto since they started in Savannah, but he did not know when that was. He also stated that he worked for ATS, but he did not remember if ATS's name was on his checks. He was aware that there was a business relationship between ATS and Palmetto, but he did not know any details of that relationship. As far as he knew ATS was in existence before Palmetto came to Savannah.

The Claimant then testified that "Carrie Scott put out the word on a Friday afternoon that ATS was going to be hiring mechanics the following Monday morning [and] for the top, senior men that wanted to work for ATS . . . to report to the union hall [at] 7:30 the following Monday so they could report to ATS to go to work." He stated that "Palmetto wasn't even mentioned." Carrie Scott was the Local 2046 union president. The Claimant thought this happened in the beginning of 1987.

Transcript of the Deposition of John Ruddy – August 24, 2006 (AX 5)

Mr. Ruddy was deposed on August 24, 2006. He testified that he began working for Atlantic Container Line ("ACL") in 1974, as manager of maintenance and repair. Six months later, they decided to perform repairs for steamship companies other than ACL and a separate company called ACL, Inc. was formed. At some point in the 1980s, the company grew to a point where about 40% of the work was for ACL and the rest was for other companies. The company then changed its name to Atlantic Technical Service, although Mr. Ruddy was not sure exactly when that occurred, other than sometime in the 1980s. Mr. Ruddy stated that he became general manager at some point in the1980s and became president in 1985 or 1986. In 1991, the company was sold to Inchcape and its name became ATS Limited Liability. Up until that time, the company had been known as Atlantic Technical Services, Inc. ATS was sold again to BMI, but Mr. Ruddy did not give a date for that sale. Mr. Ruddy reported that he retired from ATS in 2003 or 2004.

Mr. Ruddy testified that ATS performed maintenance and repair of containers and chassis for different steamship companies. He stated that ATS operated out of ports in New Jersey, Baltimore, Norfolk, Houston, Savannah, and New Orleans. ATS also had "inland facilities" in Chicago, Detroit, and Cleveland. He testified that ATS operated out of Savannah from the late 1970s until the company went out of business sometime after 2001.

Mr. Ruddy reported that ATS brokered labor until about 1995, when it began making direct contracts with the International Longshoreman's Union, because it did not want to get too involved with union, which was a parent company decision. He explained that brokering was hiring labor through a third-party in the ports. ATS hired labor from four of five different brokers and paid a premium of ten to twelve percent on top of normal charges. Mr. Ruddy stated that the contract with the brokering company included the period of time covered by the contract, the itemized prices, and a "hold harmless clause." He later stated that they required the

broker to have a contract with the ILA. The contracts usually lasted for one year, sometimes two, and had a 90-day cancellation clause, whereby either party could cancel with 90 day notice.

Mr. Ruddy explained the breakdown of the itemized prices in the contract. The contract listed the base cost of a mechanic and the cost of insurance and benefits, which included the mechanic's hourly rate, vacation pay, tools, uniforms, and retirement benefits. It also listed the liability insurance paid and workers' compensation insurance paid. All these costs were paid to the broker based on a weekly or monthly bill the broker sent to ATS, giving the breakdown of the costs for each mechanic. The broker in turn disbursed the money for costs, benefits, and insurance, including workers' compensation insurance, directly. He stated that the broker paid for all the workers' compensation insurance. He did not know if it was Longshore Act Insurance.

According to Mr. Ruddy, the "hold harmless clause" was essentially an indemnity clause that was required by the parent company, ACL. The indemnity clause was to hold ATS "harmless against any claims against the company for the, you know, injuries or any sort of thing like that." He confirmed that the injuries he spoke of were workers' compensation injuries. He stated that ACL would not allow ATS to sign a contract unless the indemnity clause was present and if there was no indemnity clause ATS "probably would not have signed the contract." The contracts were sent to the legal department of the parent company for review and, once it was approved, Mr. Ruddy was able to sign it. He stated that he signed the contracts as either general manager or president, depending on when the contract came about. Most of the contracts were kept in his files at ACL's office until ATS was sold to Inchcape, who kept the contracts in its offices in Alabama. When ATS was subsequently sold to BMI, the contracts were kept in Piscataway, New Jersey. To the best of Mr. Ruddy's knowledge, ATS's records, including the broker and indemnity contracts, were destroyed when the company went out of business.

Mr. Ruddy testified that Palmetto was one of ATS's brokers and that ATS used Palmetto for laborers in Savannah. He stated that the normal process was to nominate the number of mechanics ATS would need for a week to ten days. Mr. Ruddy stated that ATS would usually get a staff that stayed with them all the time because they wanted to keep the same group of mechanics. ATS generally needed one foreman for each group. In Savannah, ATS would usually need thirty-five to forty mechanics at any given time and would have two to four foremen. The foremen worked for the broker, as did the mechanics. He stated that the foremen were needed to control the mechanics, since ATS could not be directly involved with, discipline, or fire the mechanics. ATS laid out the work to the foremen each day and the foremen would go to the mechanics and give out the jobs. He reported that the foremen were assigned by Palmetto and they were like mechanics, but they were allowed to take orders from ATS and give them to the mechanics.

Mr. Ruddy was not sure if Palmetto had handled any workers' compensation cases on behalf of ATS. He did state that up until the time ATS started brokering its own labor, ATS never paid a workers' compensation claim in any port. He recalled a time when Palmetto did have a problem and used the 90-day cancellation clause because Palmetto was receiving too many claims. He reported that there was apparently a problem in Savannah and Palmetto did not want to broker labor to ATS any longer because it was getting too expensive. Mr. Ruddy stated that ATS

cancelled that contract, not Palmetto, and got a new broker. He was not able to recall when that was, but he thought ATS only used Palmetto for about a year or a little more than a year.

Mr. Ruddy testified that ATS began using its own labor rather than brokers around 1995 or 1996. He stated that that occurred in all the ILA ports where ATS brokered labor, including Savannah. Mr. Ruddy reaffirmed that ATS was brokering labor in Savannah from 1987 to 1989.

On cross-examination by counsel for Palmetto, Mr. Ruddy testified that ATS had managers in every port that worked directly for ATS in addition to the ILA foremen and mechanics. He recalled that Tina Will was a manager during the 1980s, as was John Perauty. He stated that while ATS was in Savannah, there were probably seven or eight different managers. The only person from Palmetto Mr. Ruddy dealt with in Savannah was Gay Mayfield. He thought Mr. Mayfield was the general manager or president of Palmetto, but he did not think he was one of the owners.

The only recollection Mr. Ruddy had regarding the contract between Palmetto and ATS in Savannah was that he would have signed the contract because ATS would not have hired brokers without a contract and he would have been the only one with authority to sign. He did not know for sure if ATS had destroyed the contract when it went out of business, but he thought someone at ATS probably did. He did not remember a provision in ATS's contract with Palmetto dealing with responsibility for workers' compensation claims in the future. He was not sure if he had ever seen a certificate of insurance from Palmetto.

Mr. Ruddy testified that at some point in the 1980s, Palmetto cancelled the contract with ATS because Palmetto no longer wanted to broker labor for ATS. He stated that since ATS was not part of the collective bargaining agreement, it could not directly order its own labor. The manager in Savannah would decide what labor he needed for the scheduled job and give the order to someone who would place an order with the ILA. He reported that ATS kept their work force pretty constant and it would usually only vary if there was a major increase or decrease in business. The mechanics were usually the same each week and the additional mechanics were obtained by seniority if needed. Any additional mechanics were called "casual labor" according to Mr. Ruddy, and they were ordered from week to week. He testified that there were times when ATS needed mechanics for a special project and a broker would get mechanics from the hall and send them to ATS for that specific project. He stated that when the additional mechanics arrived at the facility, ATS had thirty days to determine whether the mechanics were qualified if they were going to be semi-permanent, and that was usually done by the foremen.

Mr. Ruddy stated that ATS was not permitted to have a container repair shop in Savannah in the 1980s, but it was allowed to have a "preinspection lane" to place containers for storage. He reported that some time after that, ATS subleased a shop from a steamship line because ATS was not allowed to own or lease its own shop at the port. Most of the time, the mechanics worked out of mobile trucks. Mr. Ruddy stated that ATS owned the trucks and the equipment inside the trucks. He reported that the ATS managers would tell the foremen what work needed to be done each day and the foremen would direct the mechanics.

Mr. Ruddy testified that he is retired now. He also testified that between 1985 and 1989, he was located in New Jersey. He reported that he had been in New York for his first ten to twelve years, but then he went to the ACL office in New Jersey.

On cross-examination by the Claimant's counsel, Mr. Ruddy testified that ATS brought in a new person as CEO when he left the company, but he did not remember the man's name. He stated that Betty Jennings, the CFO, would probably have that information and information about the records, as she handled most of the aspects of closing ATS. Mr. Ruddy stated that last he knew, Ms. Jennings was located in New Jersey, but he could not remember the name of the town. He did not stay in contact with her and he reported last speaking with her six to eight months prior.

On redirect examination by ATS's counsel, Mr. Ruddy testified that there was no mention of payment for tools in the ILA contract. He was not sure if there was any mention of payment for tools in the contract with the broker in Savannah, but in New Jersey, ATS paid 22 cents per hour as a "tool benefit." He did not know if that money was actually spent on tools, though. He stated that the mechanics were required to have their own tools to a certain extent, but beyond certain things, the company doing the repairs was required to have the tools necessary. Mr. Ruddy testified that ATS had a welder in each truck, as well as a compressor, big body tools, and parts needed for performing repairs. He stated that the mechanics had to bring their own screw drivers, wrenches, and socket sets.

Claimant's Social Security Records (PX 6)

PX 6 contains the Claimant's Social Security records from January 1987 through December 1991. The Claimant earned the following amounts:

1987	Janus Hotels & Resorts, Inc.	$ 12,597.20
	National Container Repair Southeast	18,695.94
	Palmetto Ship Agencies, Inc.	2,613.60
	ILA Savannah Maritime Association	6,258.40
	South Atlantic ILA Employers Vacation & Holiday Fund	4,896.00
1988	Janus Hotels & Resorts, Inc.	$ 680.00
	Palmetto Ship Agencies, Inc.	37,907.65
	ILA Savannah Maritime Association	5,092.60
	South Atlantic ILA Employers Vacation & Holiday Fund	4,896.00
1989	Palmetto Ship Agencies, Inc.	$ 21,199.35
	ILA Savannah Maritime Association	4,412.00
	South Atlantic ILA Employers Vacation & Holiday Fund	5,184.00
	Georgia Stevedore Association Intl. Longshoremen's Association Welfare Fund	10.44

1990 Georgia Stevedore Association Intl.
Longshoremen's Association
Welfare Fund $ 10.44

Transcript of the Claimant's Deposition – November 16, 2005 (PX 1)

PX 1 is a copy of the transcript of the Claimant's November 16, 2005, deposition. At the hearing, this exhibit was only admitted for the purpose of evaluating the nine *Ruiz* factors. (TR at 14.) Therefore, only those portions of the Claimant's deposition testimony relevant to the *Ruiz* factors will be discussed.

On examination by counsel for ATS, the Claimant testified that he retired from ATS in 1989, but he did not know what month or what time of year it was when he left. He stated that he started at ATS in 1987 and worked there for two straight years as a working foreman. He usually worked eight hour days during which he changed tires and performed container repair, which included driving and bucking rivets. The repairs would be performed in the shop or on the berth. The mechanics would be sent on jobs when the jobs were called in.

Curriculum Vitae of Dr. A. Klein and Curriculum Vitae of Dr. T. Meyer (PX 3)

Dr. Klein received his Ph.D. in Audiology/Auditory Physiology from the University of Florida. He has been a professor in the Department of Otolaryngology at the Medical University of South Carolina since July of 1984 and is currently tenured. Dr. Klein has a Certificate of Clinical Competence in Audiology, a South Carolina Hearing Aid License, and a South Carolina Audiology License.

Dr. Meyer received his M.D. and a Ph.D. in Speech and Hearing Science from the University of Illinois at Urbana-Champaign. He has been a professor in the Department of Otolaryngology at the Medical University of South Carolina since 2004 and is the Director of the Cochlear Implant Program. Dr. Meyer is currently licensed as a physician in Indiana, Iowa, and South Carolina and has specialty board status in Otolaryngology.

DISCUSSION

I. THE CLAIMANT IS ENTITLED TO THE SECTION 20(a) PRESUMPTION OF CAUSATION

A. Section 20(a) Presumption

To be entitled to compensation under the Act for an injury, a claimant bears the initial burden of establishing a prima facie case that he suffered an injury and that the injury arose out of and in the course of employment. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP (Riley)*, 455 U.S. 608 (1982). The claimant is not required to introduce affirmative evidence that his working conditions in fact caused his injury; however, he must at least show that working conditions existed which could have caused the harm suffered. *Kelaita v. Triple A Machine*

Shop, 13 BRBS 326, 330-31 (1981). In a hearing loss case, the claimant may meet his burden by showing that he worked around loud machinery and that medical evidence shows he has suffered a noise-induced hearing loss. *Damiano v. Global Terminal & Container Service*, 32 BRBS 261, 262 (1998). Once the claimant has established a prima facie case, § 20(a) of the Act provides him with the presumption that his injury is work-related. *Id.*

It is apparent in this case that the Claimant has suffered an injury and that working conditions existed that could have caused that injury. The Claimant credibly testified that he suffers from hearing loss and that he worked around loud noises while employed as a mechanic. (TR at 23-24, 26-27, 30.) He reported that there was noise from the gasoline-powered air compressors, which ran as much as six hours per day, and emitted an exhaust noise. (TR at 24, 26.) He described the knocking noise of the impact hammers used for tire and container repair and the "loud hammering" and noise of the rivet guns, bucking bars, and air-driven gun hammers used for container repair. (TR at 24, 26-27.) He also testified that, at times, he would perform container repair from inside the container, which caused noise from the rivet guns to echo louder throughout than when he was repairing from the outside. (TR at 26.)

Further, the Claimant has presented medical evidence showing that his hearing loss is noise-induced. He has undergone three audiograms which demonstrate hearing loss. Dr. Meyer, after examining the Claimant and reviewing his July 18, 2006, audiogram, opined that the Claimant's "symmetric high-frequency sensorineural hearing loss" was likely due at least in part to his history of noise exposure. (CX 1; AX 1; PX 2.) Dr. Daniel opined that the majority of the Claimant's "[b]ilateral sloping mild to severe sensorineural hearing loss" was likely due to "his occupational noise-exposure from the 1970's to 1989." (CX 3, 4; AX 2.) Finally, Dr. Poole opined that the Claimant's relatively symmetric, bilateral sensorineural hearing loss was most consistent with environmental exposure, rather than the episodic exposure of gunfire. (CX 5.) After considering the Claimant's testimony regarding his noise exposure as a mechanic and the medical evidence of record, this Administrative law Judge finds that the Claimant has established a prima facie case that his hearing loss arose out of and in the course of his employment. Accordingly, the Claimant is entitled to the § 20(a) presumption that his hearing loss is work-related.

B. Rebuttal of the § 20(a) Presumption

Once the claimant has established his prima facie case and is entitled to the § 20(a) presumption, the employer bears the burden to rebut the presumption with "substantial countervailing evidence" that the injury was not caused or aggravated by the claimant's employment. *Swinton v. J. Frank Kelly, Inc*., 554 F.2d 1075, 4 BRBS 466, 474-75 (D.C. Cir. 1976), *cert denied* 429 U.S. 820 (1976). If the employer successfully rebuts the presumption, the record as a whole must be evaluated to determine causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935). However, if the employer does not rebut the presumption, "causation is established as a matter of law." *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252, 256 (1988).

The "substantial evidence" standard requires the employer to present evidence that is "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Swinton*, 4 BRBS at 478. Speculation and hypothetical probabilities are not

enough. *Id.* at 481 (*quoting Steele v. Adler*, 269 F.Supp. 376, 379 (D.D.C. 1967)). Moreover, the employer cannot rebut the presumption by merely suggesting other theories of causation. *Williams v. Chevron, U.S.A.*, 12 BRBS 95, 98 (1980).

The employer may allege that a subsequent non-work-related event caused the claimant's injury, but must still present substantial evidence to sever the causal connection between the claimant's employment and his injury. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 275 (1989). If the subsequent non-work-related injury is a natural or unavoidable result of the work-related injury, the employer will be liable for the entire resulting disability. *Id.*; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991). However, if the employer presents substantial evidence that the subsequent injury is the result of an intervening event, such as the claimant's negligence, the employer will be relieved of liability for the portion of the disability that can be attributed to the subsequent injury. *James*, 22 BRBS at 275; *Merrill*, 25 BRBS at 144 (*citing Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14, 16 (1987)). Additionally, under the "aggravation rule," if the work-related injury "aggravates, accelerates or combines with a non-work-related infirmity, disease, or underlying condition," the whole injury is compensable. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85, 86 (1986).

In its post-hearing brief, ATS admits that the Claimant has suffered a hearing loss and that he worked in a noisy environment, but it asserts that it has rebutted the § 20(a) presumption and severed the causal connection.[5] Specifically, ATS relies on the medical reports of Dr. Daniel and the Claimant's testimony that he has hunted since age 14 and has continued to hunt after retiring in 1989. (ATS Brief at 13-14.) This evidence fails to meet the "substantial evidence" standard for three reasons. First, in offering the Claimant's testimony that he has hunted since age 14 without hearing protection as rebuttal evidence, ATS is merely suggesting another way the Claimant's hearing loss could have occurred, which is not substantial evidence.

Second, as the Benefits Review Board ("Board") held in *Rajotte*, if a work-related injury aggravates, accelerates, or combines with a pre-existing non-work-related condition, the entire resulting disability is compensable. 18 BRBS at 86. The Claimant's testimony that he has hunted since age 14 and Dr. Daniel's opinion that part of the Claimant's hearing loss may be attributed to hunting simply establishes that the Claimant may have had a pre-existing non-work-related condition. It does not operate to sever the causal connection, particularly since Dr. Daniel still attributed the vast majority of the Claimant's noise-induced hearing loss to his employment. (CX 3, 4; AX 2.)

Third, although ATS may allege that a subsequent non-work-related event, such as hunting, caused the Claimant's injury, the Claimant's testimony that he continued to hunt without hearing protection after retiring in 1989 is not substantial evidence. Again, ATS is merely suggesting another way all or a portion of the Claimant's hearing loss could have occurred. Additionally, Dr. Daniel's opinion is not the substantial evidence necessary to sever the causal connection between the Claimant's employment and all or any portion of his hearing loss. Dr. Daniel's opinion is too speculative and equivocal, in that he gives no support for his conclusion that the Claimant has additional hearing loss from continued hunting after 1989 that "probably constitute[d] about 15% or so of his total hearing loss." (CX 3; AX 2.) Thus, even if the

[5] Palmetto does not attempt to rebut the § 20(a) presumption.

Claimant was negligent in failing to wear hearing protection while hunting despite experiencing ringing in his ears and hearing loss, and that negligence was an intervening cause, ATS has not presented substantial evidence to relieve liability for any portion of the Claimant's noise-induced hearing loss. Accordingly, this Administrative Law Judge finds that ATS failed to rebut the § 20(a) presumption and the causal connection between the entire amount of the Claimant's noise-induced hearing loss and his employment has been established as a matter of law.

II. EXTENT OF THE CLAIMANT'S DISABILITY

The Act defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2000). Generally, the claimant must have an economic loss and a physical or psychological impairment to receive compensation. *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991). However, if the claimant sustains a permanent partial disability to a body part listed in the schedule, he is entitled to compensation "regardless of whether his earning capacity has actually been impaired." *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363, 363 (1980) [hereinafter *PEPCO*].

When the claimant has suffered a permanent partial disability and the body part is one listed in the schedule, he is entitled to compensation equal to two-thirds of his average weekly wage for a specified number of weeks. 33 U.S.C. § 908(c)(1)-(20) (2000). Where the injury is binaural hearing loss, the claimant is entitled to two hundred weeks of compensation. 33 U.S.C. § 908(c)(13)(B). If the claimant has sustained permanent partial loss or loss of use of the body part, "[c]ompensation . . . may be for proportionate loss or loss of use of the member." 33 U.S.C. § 908(c)(19). Thus, the claimant is entitled to receive the full compensation rate of two-thirds of his average weekly wage for the number of weeks proportionate to the loss of use. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569, 17 BRBS 29 (CRT) (5th Cir. 1985). Unless the claimant can prove he is totally disabled, he is not entitled to any more compensation than that awarded by the schedule. *PEPCO*, 14 BRBS at 363; *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196, 199 (1984).

The claimant "is entitled to benefits for the totality of his occupational hearing loss based on the most credible evidence of record." *Steevens v. Umpqua River Navigation*, 35 BRBS 129, 133 (2001). Pursuant to the Act and Regulations, an audiogram is presumptive evidence of the amount of the claimant's hearing loss if: (1) it was administered by a licensed or certified audiologist, a physician certified in otolaryngology, or a certified technician under an audiologist's or physician's supervision; (2) it was provided to the claimant, along with a report thereon, either at the time it was administered or within thirty days afterward; and (iii) no contrary audiogram with equal probative value is produced that was made within six months where exposure to excessive noise does not continue. 33 U.S.C. § 908(c)(13)(C); 20 C.F.R. § 702.441 (2004). If the audiogram is performed by a technician, the results must be interpreted and certified by a licensed or certified audiologist or otolaryngologist. 20 C.F.R. § 702.441(a)(1). The extent of the claimant's hearing loss also must be measured "in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association." 33 U.S.C. § 908(c)(13)(E). Additionally,

the audiometer used must be calibrated in accordance with current American National Standard Specifications for Audiometers. 20 C.F.R. § 702.441(d).

If the audiogram does not meet the requirements of 33 U.S.C. § 908(c)(13)(C) and 20 C.F.R. § 702.441, it is not inadmissible; rather, the administrative law judge has the discretion to determine the probative value of the test in determining the claimant's hearing loss. *Craig v. Avondale Industries, Inc.*, 36 BRBS 65, 67 (2002). If there is more than one credible audiogram, it is within the administrative law judge's authority to determine the amount of hearing loss by averaging the results of the audiograms. *Steevens*, 35 BRBS at 133.

In this case, the parties have stipulated that the Claimant's percentage of hearing loss based on the June 30, 2005, and July 18, 2006, audiograms was determined in accordance with the American Medical Association guidelines. (TR at 5.) The June 30, 2005, audiogram was performed by C. Burns, but the examiner's qualifications are not of record. (CX 7.) The results were, however, reviewed and interpreted by Dr. Poole, a certified otolaryngologist. (CX 5.) The July 18, 2006, audiogram was performed by Dr. Klein, a licensed audiologist, and was reviewed and interpreted by Dr. Meyer, a Board-certified otolaryngologist. (CX 1, 2; AX 1; PX 2, 3.) Additionally, there is no evidence that audiograms contrary to the June 30 and July 18 audiograms were obtained. However, neither of these audiograms are presumptive evidence of the amount of the Claimant's hearing loss, because there is no evidence that the Claimant was provided a copy of the audiograms and accompanying reports within thirty days, nor is there any evidence indicating that the audiometers were properly calibrated according to the applicable standards.

Even though the two audiograms are not presumptive evidence of the Claimant's hearing loss, they are still entitled to probative value. The parties stipulated that the June 30, 2005, audiogram established a 26.6% binaural hearing loss and the July 18, 2006, audiogram established a 19.1% binaural hearing loss. (TR at 5.) Both tests show a similar pattern of bilateral sensorineural hearing loss. (CX 2, 7.) The reliability of both tests was indicated as "good." (CX 7; CX 2.) Additionally, both tests were reviewed and interpreted by certified otolaryngologists. (CX 5; PX 3.) For these reasons, this Administrative Law Judge finds that the tests are entitled to equal probative value and the results will be averaged to determine the amount of the Claimant's hearing loss. Accordingly, the Claimant's amount of hearing loss is 22.85%, which entitles him to 45.7 weeks of compensation pursuant to the schedule.

III. ENTITLEMENT TO MEDICAL TREATMENT BENEFITS

An employer is responsible for the claimant's reasonable and necessary medical expenses for the treatment of a work-related injury. 33 U.S.C. § 907(a) (2000); *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). It is the claimant's burden to show the necessity of past and/or future medical treatment. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 114 (1996). The claimant can establish a prima facie case for payment of medical expenses where a physician "indicates treatment was necessary for a work-related condition." *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984).

In this case, the Claimant has established that his noise-induced hearing loss was caused or aggravated by his employment. Therefore, he is entitled to all reasonable and necessary medical expenses pursuant to 33 U.S.C. § 907. Dr. Meyer opined that the Claimant would be an "excellent candidate" for hearing aids as long as the configuration of his ear canals could be accommodated. (CX 1; AX 1; PX 2.) He further recommended that the Claimant see an audiologist experienced in fitting irregularly shaped ear canals and continue to have his hearing tested. (CX 1; AX 1; PX 2.) Dr. Poole also opined that the Claimant would benefit from and be a good candidate for hearing aids. (CX 5.) Additionally, the tester who performed the Claimant's December 9, 2005, audiogram also recommended the Claimant undergo hearing aid evaluation. (CX 6.) Dr. Daniel did not indicate whether the Claimant needed or would benefit from hearing aids, but he did schedule a follow-up visit with the Claimant. (CX 4.) Accordingly, based on the opinions of Drs. Meyer and Poole, this Administrative Law Judge finds that the Claimant is entitled to such future medical benefits as necessary for treatment of his work-related noise-induced hearing loss, including hearing aids.

IV. ATS IS THE EMPLOYER RESPONSIBLE FOR PAYMENT OF THE CLAIMANT'S BENEFITS UNDER THE ACT

A. The Claimant was a Borrowed Employee of ATS at the Time of His Injury

Under the "borrowed employee" doctrine, a borrowing employer is liable for the payment of benefits under the Act for the work-related injuries of a borrowed employee. *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 311-12 (5th Cir. 1969); *Gaudet v. Exxon Corp.*, 562 F.2d 351, 355-56 (5th Cir. 1977). In the Court of Appeals for the Eleventh Circuit, the nine factors set out in *Ruiz* and reiterated in *Gaudet* are used to determine whether an employee is a borrowed employee.[6] These factors are:

1. Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?
2. Whose work is being performed?
3. Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?
4. Did the employee acquiesce in the new work situation?
5. Did the original employer terminate his relationship with the employee?
6. Who furnished tools and place for performance?
7. Was the new employment over a considerable length of time?
8. Who had the right to discharge the employee?
9. Who had the obligation to pay the employee?

Gaudet, 562 F.2d at 355; *Ruiz*, 413 F.2d at 312-13. None of these factors alone is determinative of a borrowed employee relationship; instead, each factor must be weighed according to the facts of the particular case.[7] 413 F.2d at 312.

[6] Although they are Fifth Circuit cases, *Ruiz* and *Gaudet* are binding on the Eleventh Circuit pursuant to *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981).

[7] In *Gaudet*, the court stated that the most pertinent factors are whether the second employer was responsible for the employee's working conditions and the associated risks, which parallels the fifth and sixth *Ruiz* factors, and whether

Control over the employee is one of the most important factors and must be distinguished from "mere suggestion as to details or the necessary co-operation." *Id.* ATS contends that it had no control over the Claimant or any of the other mechanics working for ATS because the foremen directed the mechanics to carry out the ATS work orders and the foremen were employees of Palmetto. At the hearing, the Claimant testified that he was a "working foreman" because of his seniority in the union and his job duties consisted of performing general mechanic duties as well as acting as a liaison between the other mechanics and the maintenance and repair (""M & R"") manager. (TR at 28; AX 3 at 18.) The Claimant stated that he received his work orders from the "M & R" managers or a secretary from the ATS office by word of mouth. (TR at 50.) He testified that, as far as he knew, the "M & R" manager was an employee of ATS. (TR at 45.)

In his deposition, Mr. Ruddy testified Palmetto assigned foremen to ATS, and ATS used the foremen to "control the men at the port." (AX 5 at 15.) He also testified that a foreman was "essentially like another mechanic, but he was able to take our orders and pass them down to the mechanics." (AX 5 at 15.) The foremen received work orders daily from ATS managers, who were direct employees of ATS. (AX 5 at 15, 17, 22, 24.) The foremen then gave the orders directly to the mechanics. (AX 5 at 15.) Based on the testimony of the Claimant and Mr. Ruddy, it is apparent that ATS had control over the foremen, as the foremen took orders directly from the ATS "M & R" managers. The orders given to the foremen were not mere suggestions as to the details of carrying out the work or necessary co-operation; they were direct orders to repair containers. Since the Claimant was a working foreman, he was under the direct control of ATS "M & R" managers and this factor weighs heavily in favor of a finding that ATS was a borrowing employer.

Most of the other factors also clearly weigh in favor of a finding that ATS was a borrowing employer. The Claimant was performing work assignments for ATS, as ATS, not Palmetto, was in the business of container and chassis repair. He clearly acquiesced to his work situation with ATS, since he thought he was working for ATS, not Palmetto. (TR at 27-28.) In fact, he stated that Palmetto was never even mentioned when the ATS job opened. (ATS 4 at 17.) He testified that he chose to work for ATS; he reported to the ATS shop when the mechanic job opened, he reported to ATS every weekday thereafter without being specifically ordered to do so, and he did not work for any other company. (TR at 44, 46; AX at 17.) Additionally, his employment with ATS was full time Monday through Friday for the two years prior to his retirement, which is a considerable amount of time. (TR at 46, 51.)

Further, although the Claimant furnished some of his own smaller tools, ATS furnished welders, compressors, "big body tools," and all the parts needed to perform repairs. (AX 5 at 26-27.) The Claimant also wore an ATS uniform. (TR at 34.) ATS also provided the mobile trucks the mechanics worked out of, and the sign on each truck identified it as an ATS truck. (TR at 28; AX 5 at 21.) The Claimant also testified that he worked out of a shop for the two years he was

---

the new employment was of sufficient duration that the employee could be presumed to have evaluated the risks and acquiesced, which parallels the fourth and seventh *Ruiz* factors. 562 F.2d at 357. The court further stated that the other factors are helpful, but not essential. *Id.* The court's focus on these particular factors, however, appears to be limited to cases where the borrowed employee doctrine is being used as a defense to common law liability in the context of the Act. *See id.* Since the dispute in this case is over which employer is the responsible under the Act, rather than whether that employer is subject to common law tort liability or liability under the Act, the *Gaudet* focus is inappropriate here.

with ATS that housed both ATS and Palmetto for about a year, but that ATS's name was on that shop the entire time and it remained there even after Palmetto left the port. (TR at 51-52.)

Moreover, based on Mr. Ruddy's deposition testimony, there was an agreement between Palmetto and ATS whereby Palmetto agreed to provide labor to ATS for a fee. (AX 5 at 8.) ATS would order the number of mechanics it needed on a weekly basis from Palmetto, and Palmetto would procure the labor. (AX 5 at 14, 20.) The Claimant has also testified that he thought there was some kind of business relationship between Palmetto and ATS, but he did not know the details. (TR at 38; AX 4 at 16.)

A few of the other factors are not as clearly in favor of a finding that ATS was a borrowing employer, but still ultimately weigh in favor of that conclusion. There is no evidence that Palmetto, the original employer, terminated its relationship with the Claimant when he began working for ATS. However, the Board has approved the Fifth Circuit's holding that "this factor does not require a lending employer to completely sever its relationship with the employee, as such a requirement would effectively eliminate the borrowed employee doctrine." *Fitzgerald v. Stevedoring Services of America*, 34 BRBS 202, 209 (2001) (*citing Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615, 617 (5th Cir. 1986)). Instead, the emphasis "should focus on the lending employer's relationship with the employee while the borrowing occurs." *Fitzgerald*, 34 BRBS at 209; *Capps*, 784 F.2d at 618. Here, the only relationship that remained appears to be that Palmetto was issuing the Claimant's paychecks and paying his insurance. (PX 6.) Palmetto had no control over the Claimant's daily work activities, a fact which the Claimant testified to at the hearing. (TR at 45.) Additionally, the Claimant testified that Palmetto did not direct him to go to ATS on a weekly basis; he went each week without specifically being ordered. (TR at 44, 46.) He also testified that he continued to work for ATS even after Palmetto left the port. (TR at 52.) Thus, there appears to have been no substantial relationship between the Claimant and Palmetto once the Claimant began working for ATS.

It is true that ATS did not have the power to discipline or fire the Claimant or any of the other mechanics. (AX 5 at 15.) However, "the proper focus . . . is whether the borrowing employer had the right to terminate the employee's services with itself." *Fitzgerald*, 34 BRBS at 210 (*citing Capps*, 784 F.2d at 618). Mr. Ruddy testified that ATS's managers would determine the number of mechanics it needed on a weekly basis and thus had the power to decrease the number of mechanics working for ATS depending on the amount of work it had. (AX 5 at 14, 20.) He also testified that pursuant to the contract, ATS had the power to evaluate whether incoming mechanics were qualified to work for ATS. (AX 5 at 20.) Thus, ATS did have the power to discharge the Claimant from its employ, even if it could not fire him from Palmetto or the ILA.

ATS also argues that it did not have the obligation to pay the Claimant, which weighs against a finding of it being a borrowing employer. However, in a situation like this, the fact that the second employer furnishes the funds with which the original employer pays the employee weighs in favor of finding a borrowed employee relationship. *Fitzgerald*, 34 BRBS at 210; (*citing Capps*, 784 F.2d at 618). In this case, Palmetto did pay the Claimant directly, but ATS paid Palmetto for the Claimant's services. (AX 5 at 8-9.) Thus, this factor also weighs in favor of a finding that ATS is a borrowing employer.

After analyzing and weighing the evidence in light of the nine *Ruiz* factors, this Administrative Law Judge finds that ATS was a borrowing employer at the time of the Claimant's work-related injury. Accordingly, ATS is responsible for payment of the Claimant's benefits under the Act.

B. ATS Failed to Establish an Indemnification Agreement with Palmetto

A borrowing employer will not be held liable for the payment of benefits under the Act if another entity has a valid contractual obligation to pay. *Pilipovich v. CPS Staff Leasing, Inc.*, 31 BRBS 169, 171 (1997). Contractual issues must usually be resolved in state court, but an administrative law judge has jurisdiction to resolve contractual indemnity and insurance issues if they are "necessary to the resolution of a claim under the Act." *Id.* The issues are necessary to resolution of the claim if they are "ancillary to the responsible employer issue," an issue that is properly before an administrative law judge. *Id.* at 172. The Fifth Circuit, however, has stated that whether the original employer agreed to indemnify the borrowing employer for workers' compensation claims under the Act "relates to the compensation claim only in the sense that the question would not arise but for [the claimant's] compensation claim," so the administrative law judge has no jurisdiction. *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92, 99 (CRT) (5th Cir. 2001) [hereinafter *TESI*].[8]

Based on *Pilipovich* and *TESI*, to determine whether this Administrative Law Judge has jurisdiction to hear the indemnification agreement issue, it is necessary to first determine whether the indemnification agreement was a condition precedent to ATS entering a contract with Palmetto or a condition subsequent. Pursuant to *Pilipovich*, if the indemnification agreement was a condition precedent to the broker contract, as ATS argues, resolution of the issue would be ancillary to the issue of whether ATS or Palmetto is the responsible employer and would be within the jurisdiction of this Administrative Law Judge. However, if the indemnification was a condition subsequent whereby Palmetto would simply indemnify ATS after a claim for compensation arose, as Palmetto argues, it would be analogous to the situation in *TESI*, and this Administrative Law Judge would not have jurisdiction to decide the issue.

The best way to determine whether the indemnity agreement was a condition precedent or subsequent is by analyzing the terms of the indemnity agreement. However, the precise terms cannot be determined, since the physical contract is not in evidence because Palmetto is defunct and, according to Mr. Ruddy, ATS's records and contracts were likely destroyed when ATS went out of business. (AX 5 at 13, 19.) If the precise terms of a contract are unknown because the contract is no longer available, other evidence may be presented to show the contract existed. *Dolowich v. Zurich Ins. Co.*, 17 BRBS 197, 200 (1985). For example, the Board in *Dolowich* held that Department of Labor records showing the insurance carrier covered the employer for disability claims at the time in question was sufficient evidence to hold the carrier liable, even though the precise terms of coverage were not known. *Id.*

Since the physical contract is not available, ATS relies solely on Mr. Ruddy's testimony, as the former president of ATS, regarding the existence of the indemnification agreement. Mr. Ruddy testified that the contract must have had a "hold harmless" clause, or else ATS's parent company

[8] Although this Fifth Circuit case is not binding on a case arising within the Eleventh Circuit, since it was decided in 2001, it is persuasive, as it deals with a very similar situation.

"probably" would not have allowed him to sign the contract with Palmetto. (AX 5 at 8-9.) However, Mr. Ruddy had no recollection of ever seeing or signing the indemnification agreement; he just knew he "would have signed a contract with them. . . . I'm almost certain in the case of Savannah, New York, and Houston, and those ports that I did." (AX 5 at 18.) He further stated that ATS would not have hired a broker without a contract and he was the only one that would really have had authority to sign the contract. (ATX 5 at 18.) Nonetheless, he testified that he usually gave the contract to ATS's parent company's legal department for review before signing, and he did not sign until the company gave him the go ahead. (AX 5 at 9.) Additionally, ATS relies on Mr. Ruddy's statement that Palmetto cancelled the contract with ATS because "the claims were coming in too hot and heavy . . . [and] they no longer wished to broker labor for us because it was getting to expensive for them" as evidence that the indemnification agreement existed. (AX 5 at 15.) Yet he also testified, "I think we used Palmetto for just about a year, maybe a little more, but I can't be sure of that." (AX 5 at 16.)

Contrary to ATS's assertion, Mr. Ruddy's testimony alone is not enough to support a finding of the existence of an indemnification agreement at the time of the Claimant's injury, particularly when he has no recollection of signing or seeing the alleged agreement and thinks that Palmetto cancelled the contract after one year "or a little more." Additionally, the fact that he sent the contracts to ATS's parent company's legal department for approval raises a significant question regarding the existence of an indemnification agreement, as there is the potential that the legal department could have approved the contract without an indemnification agreement. Moreover, his statement that Palmetto did not want to broker labor for ATS anymore because of the expense is not enough to establish that there was an indemnification agreement as a condition precedent to providing employees to the borrowing company.

Based on the evidence, this Administrative Law Judge finds that ATS has failed to establish that there was a condition precedent to providing borrowed employees between ATS and Palmetto that would shift liability under the Act from ATS to Palmetto at the time of the Claimant's injury. Accordingly, ATS has failed to establish a basis to shift liability for Claimant's hearing loss to Palmetto and is found to be the responsible employer that is liable for payment of the Claimant's benefit entitlements under the Act.

V. TIMELINESS OF NOTICE OF CONTROVERSION

If an employer wishes to controvert the claimant's right to compensation, it must file a notice of that controversion on or before the fourteenth day after the employer has knowledge of the injury. 33 U.S.C. § 914(d). If the employer does not file a timely notice, it will be subject to a 10% penalty for any installments not paid within fourteen days after the installments are due. [9] 33 U.S.C. § 914(e). If the employer ultimately does file a notice, but it is untimely, the penalty will be assessed only on those installments that were due prior to the employer's filing of the untimely notice. *Cox v. Army Times Publishing Co.*, 19 BRBS 195, 198 (1987).

[9] Pursuant to 33 U.S.C. § 914(b), the first installment is due on the fourteenth day after the employer obtains notice of the claimant's injury. Thus, the employer has fourteen days to file a timely notice and if it does not, it has twenty-eight days from the date it obtains knowledge of the claimant's injury in which to commence payments. *Pullin v. Ingalls Shipbuilding*, 27 BRBS 45, 46 (1993).

In this case, there is no evidence in the record that Palmetto ever filed a Notice of Controversion, much less a timely notice. However, since ATS was determined to be the employer responsible for payment of benefits, the issue of whether Palmetto filed a timely Notice is moot. ATS alleges it obtained knowledge of the Claimant's injury on August 23, 2005, and there is no evidence in the record to contradict this allegation. (CX 9.) Thus, ATS had fourteen days from that date, or until September 6, 2005, to file its Notice of Controversion. ATS's Notice is dated August 26, 2005; however, it was not filed until September 12, 2005, twenty days after obtaining knowledge of the Claimant's injury. (CX 9.) Accordingly, ATS failed to timely file its Notice of Controversion.

Although ATS is subject to the penalty provided for in 33 U.S.C. § 914(e) for its failure to timely controvert, no penalty will be assessed. The first installment of compensation was not due to the Claimant until September 20, 2005, twenty-eight days after ATS received knowledge of the Claimant's injury and eight days after ATS untimely filed its Notice. Since no installments were yet due at the time it filed its Notice of Controversion, there is no amount on which to assess the penalty. Therefore, the Claimant is not entitled to receive the 10% penalty.

CONCLUSION AND FINDINGS OF FACT

1. The Claimant filed a timely claim against both Employers.

2. The Claimant's average weekly wage was $934.15 per week, which equals a compensation rate of $622.76 per week.

3. The Claimant established a prima facie case that his noise-induced hearing loss arose out of and in the course of his employment as a mechanic, invoking the 33 U.S.C. § 920(a) presumption that his noise-induced hearing loss is work-related.

4. Both Employers failed to rebut the 33 U.S.C. § 920(a) presumption with substantial countervailing evidence.

5. The Claimant has established that his noise-induced hearing loss is work-related as a matter of law.

6. The Claimant has established a 22.85% binaural hearing loss.

7. The Claimant is entitled to compensation for his work-related noise-induced hearing loss for 45.7 weeks.

8. The Claimant is entitled to the payment of future medical benefits, including hearing aids, pursuant to 33 U.S.C. § 907 for his work-related noise-induced hearing loss.

9. ATS failed to establish the existence of an indemnification agreement with Palmetto that would shift liability under the Act to Palmetto.

10. ATS is the employer responsible for payment of the Claimant's compensation benefits under the Act.

11. ATS is liable for the Claimant's hearing loss medical benefits under the Act.

12. ATS failed to file a timely Notice of Controversion as required by 33 U.S.C. § 914(d).

13. The Claimant is not entitled to the 10% penalty provided for in 33 U.S.C. § 914(e) for ATS's failure to file a timely Notice of Controversion.

ORDER

It is hereby **ORDERED** that:

1. In accordance with the Act, the Respondent Employer/Carrier, ATS/ACE American Insurance, shall pay compensation to the Claimant at a rate of $622.76 per week for a period of 45.7 weeks.

2. The Respondent Employer/Carrier, ATS/ACE American Insurance, shall provide such reasonable, appropriate, and necessary medical treatment as the nature of the Claimant's work-related hearing loss requires pursuant to 33 U.S.C. § 907.

3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the District Director shall be paid on all accrued benefits computed from the date on which each payment was originally due to be paid.

4. The Respondent Employer/Carrier, ATS/ACE American Insurance, shall receive credit for any related disability benefits previously paid to the Claimant.

5. All monetary computations made pursuant to this Order are subject to verification by the District Director.

6. Within twenty (20) days of the receipt of this Decision and Order, the Claimant's attorney shall file a fully itemized and supported fee petition with the Court, and send a copy of same to opposing counsel who shall then have fifteen (15) days to respond with objections thereto.

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/MSW/jcb
Newport News, Virginia